No. 92-31

In the Supreme Court of the United States

OCTOBER TERM, 1992

MUSICK, PEELER & GARRETT, ET AL., PETITIONERS

v.

EMPLOYERS INSURANCE OF WAUSAU, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE SECURITIES AND EXCHANGE COMMISSION AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether there is an implied right to contribution under Section 10(b) of the Securities Exchange Act of 1934 and the Securities and Exchange Commission's Rule 10b-5.

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BRIEF FOR THE SECURITIES AND EXCHANGE COMMISSION AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

INTEREST OF THE SECURITIES AND EXCHANGE COMMISSION

The Securities and Exchange Commission is responsible for the administration and enforcement of the federal securities laws. Private actions under Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. 78j(b), and Rule 10b-5, 17 C.F.R. 240.10b-5, constitute "an essential tool for enforcement of the 1934 Act's requirements." *Basic Inc.* v. *Levinson*, 485 U.S. 224, 231 (1988). This case presents the question whether a right of contribution is available in private actions under Section 10(b) and Rule 10b-5. Because the resolution of that issue will have an impact on Section 10(b) litigation, the Commission has an interest in the outcome of this case.

STATUTES AND RULE INVOLVED

Section 11(f) of the Securities Act of 1933, 15 U.S.C. 77k(f), and Sections 9(e), 10(b), and 18 of the Securities Exchange Act of 1934, 15 U.S.C. 78i(e), 78j(b), and 78r, and Rule 10b-5, 17 C.F.R. 240.10b-5, are set forth in relevant part in the appendix to this brief.

STATEMENT

1. In December 1983, Cousins Home Furnishing, Inc. made a public offering of its stock. Shareholders who purchased shares in the offering subsequently commenced a class action against Cousins, its holding company, certain of its officers and directors, and its two lead underwriters. The complaint alleged that the offering was misleading in violation of the federal securities laws, including Section 10(b) and Rule 10b-5.[1] The complaint did not name the attorneys and accountants who had performed professional services in connection with the offering. Pet. App. 3; J.A. 14-15.

The defendants settled the class action by agreeing to pay the shareholders $13.5 million. The district court approved the settlement pursuant to Rule 23, Fed. R. Civ. P., after a good faith hearing to determine the defendants' fair share of the damages alleged in the case. Pet. App. 3, 15-16. Respondents, the insurers of most of the settling defendants, funded $13 million of the settlement. J.A. 5-7, 16.

2. After the settlement was consummated, respondents commenced an action seeking contribution from petitioners, the attorneys and accountants involved in the public offering.[2] The complaint alleged that petitioners

[1] The complaint also alleged, *inter alia*, violations of Sections 11 and 12(2) of the Securities Act of 1933, 15 U.S.C. 77k and 77*l*(2), and pendent claims under California law. J.A. 15.

[2] Respondents are subrogated to the rights of the settling defendants. Pet. App. 4; J.A. 7.

had committed securities frauds that caused the injuries suffered by the shareholders in the class action, and were therefore liable for contribution under Section 10(b) and Rule 10b-5.[3] Pet. App. 3, 16-17; J.A. 30-33, 34-36.

Petitioners filed a motion to dismiss asserting that the district court in the class action had found that the settlement reflected the settling defendants' "fair share" of the total liability, and, therefore, respondents were not entitled to contribution. The district court agreed and dismissed the action. Pet. App. 4, 18-24.

3. The court of appeals reversed. Pet. App. 1-13. The court noted that, although "[n]o explicit right to contribution is provided for in section 10(b) * * * or Rule 10b-5," circuit precedent had concluded that "these provisions imply a right of contribution." Pet. App. 4.[4] In this case, the court of appeals found that the district court had erred in dismissing respondents' claim for contribution. The court explained that the finding that the settling defendants had paid their fair share of damages "relative to the other defendants involved in the [class] litigation" did not dispose of the question whether they had paid a fair share relative to other parties, such as petitioners, who were also potentially responsible for the class's damages. Pet. App. 8.

The court also concluded that policy considerations favored allowing contribution. Pet. App. 10-11. While acknowledging that contribution claims require additional litigation, the court noted that "[t]hese costs, however, were deemed acceptable in the context of securities law when Congress explicitly provided for contribution" un-

[3] The complaint also included a contribution claim against the accountants under Section 11 of the Securities Act of 1933, 15 U.S.C. 77k, J.A. 37-38, and contribution and indemnity claims under state law, J.A. 33, 36-37, 38-46.

[4] The court cited *Franklin* v. *Kaypro Corp.*, 884 F.2d 1222, 1226 (9th Cir. 1989), cert. denied, 111 S. Ct. 232 (1990), and *Smith* v. *Mulvaney*, 827 F.2d 558, 561 (9th Cir. 1987).

der the express rights of action in Section 11(f) of the Securities Act, 15 U.S.C. 77k(f), and Sections 9(e) and 18(b) of the Exchange Act, 15 U.S.C. 78i(e), 78r(b). Pet. App. 11.

SUMMARY OF ARGUMENT

The implied right of action under Section 10(b) and Rule 10b-5 was not established by Congress, but this Court has consistently derived the legal rules governing that action from congressional policies reflected in the express terms of the Securities Exchange Act. In fashioning the express causes of action in that Act, Congress determined that the common law rule precluding contribution in fraud actions did not serve the policies of the securities laws, and accordingly created express rights of contribution. There is no reason to depart from that congressional policy determination in Section 10(b) actions.

A. Federal courts have the power to recognize contribution rights under Section 10(b). The Court has held that federal courts may not ordinarily imply contribution rights into an *express* federal statutory cause of action. In this case, however, the Court is faced with the task of implementing an *implied* cause of action that Congress did not intentionally create, but that has become an integral part of federal law. In that setting, the Court has recognized that the implied cause of action must be judicially defined and that the Court has power to "round[] out" the parties' rights to ensure even-handed application of the law. *Virginia Bankshares, Inc.* v. *Sandberg*, 111 S. Ct. 2749, 2764 (1991).

Those principles justify recognition of contribution under Section 10(b), because there is compelling evidence, in the comparable express causes of action, that Congress intended to permit contribution for similarly situated securities fraud defendants. For the courts to ignore that intention would be unfair to defendants who

are subject to suit under Section 10(b) only because courts have implied that right. The proper approach is to give effect to the overall legislative scheme. Recognition of contribution gathers additional support from the longstanding acceptance of that right in the lower federal courts.

B. Sections 9(e) and 18(b) of the Exchange Act expressly state that "[e]very person who becomes liable to make any payment under this [provision] may recover contribution as in cases of contract from any person who, if joined in the original suit, would have been liable to make the same payment." 15 U.S.C. 78i(e), 78r(b). In changing the common law rule, Congress adopted a clear policy favoring contribution that also applies to Section 10(b). Sections 9 and 18, like Section 10(b), afford damages remedies for securities fraud; they are aimed at the same types of misconduct; and they support the same goals. In *Lampf, Pleva, Lipkind, Prupis & Petigrow* v. *Gilbertson*, 111 S. Ct. 2773 (1991), the Court looked to those Sections to supply a statute of limitations for Section 10(b); Sections 9 and 18 are equally relevant to the issue of contribution. Because Sections 9, 10(b), and 18 compose a family of rights that should be construed to form a coherent whole, contribution under Section 10(b) should be modeled on those textually explicit Exchange Act provisions.

C. The Court need not balance policy considerations to recognize contribution rights under Section 10(b); Congress has already performed that task in fashioning the comparable express rights. If it is necessary to weigh the competing policies, however, the fairness concerns furthered by contribution support its recognition here. There is no evidence that contribution will detract from the deterrent effect of Section 10(b), unduly inhibit settlements, or create unmanageably complex litigation.

ARGUMENT

A RIGHT OF CONTRIBUTION SHOULD BE RECOGNIZED IN PRIVATE ACTIONS UNDER SECTION 10(b) AND RULE 10b-5

The implied right of action under Section 10(b) is a critical and well-established means of private enforcement of the federal securities laws. Although the existence of that right is unquestionable, *Basic Inc.* v. *Levinson*, 485 U.S. 224, 230-231 (1988); *Herman & MacLean* v. *Huddleston*, 459 U.S. 375, 380 (1983); *Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185, 196 (1976); *Blue Chip Stamps* v. *Manor Drug Stores, Inc.*, 421 U.S. 723, 730 (1975); *Superintendent of Insurance* v. *Bankers Life & Casualty Co.*, 404 U.S. 6, 13 n.9 (1971), this Court has "made no pretense that it was Congress' design to provide the remedy afforded." *Lampf, Pleva, Lipkind, Prupis & Petigrow* v. *Gilbertson*, 111 S. Ct. 2773, 2780 (1991). The Court, however, has not ignored evidence of congressional intent, drawn from the language and structure of the securities laws as a whole, in analyzing issues that arise in Section 10(b) litigation. Rather, the Court has often construed Section 10(b) to conform it to the structure and policies reflected in the overall legislative scheme.[5]

That principle is directly applicable in this case. In the original 1934 Exchange Act, Congress created express rights of contribution in Sections 9 and 18—the provisions most analogous to Section 10(b). 15 U.S.C. 78i(e), 78r(b); see also 15 U.S.C. 77k(f). In providing those contribution rights, Congress established a rule of shared liability for shared fault. That legislative choice should

[5] See *Lampf*, 111 S. Ct. at 2780-2781 (applying to Section 10(b) the statutes of limitation governing the express rights of action in the Exchange Act); *Blue Chip Stamps*, 421 U.S. at 733-736 (defining standing limitations under Section 10(b) in light of the express rights of action in the Exchange Act).

inform the interpretation of Section 10(b). There can be "no clearer indication of how Congress would have balanced the policy considerations" raised by contribution claims under Section 10(b) "than the balance struck by the same Congress in [defining] similar and related protections." *Lampf*, 111 S. Ct. at 2780.

A. Federal Courts Have Power To Imply A Right Of Contribution Under Section 10(b)

1. There is no express right to contribution provided in Section 10(b) of the Exchange Act, nor is the issue addressed in the legislative history of the Exchange Act. That is not surprising, given that the underlying right to sue under Section 10(b) is itself implied, and there is no "indication that Congress considered the problem of private suits under [Section 10(b)] at the time of its passage." *Blue Chip Stamps*, 421 U.S. at 729.[6] While the textually explicit rights in the Exchange Act reveal a clear policy in favor of contribution that is also applicable to Section 10(b), see pp. 15-21, *infra*, the threshold issue in this case is whether the federal courts have the power to defer to that policy.

In two prior cases, the Court has considered the reverse issue: whether courts may depart from congressional

[6] After the Commission adopted Rule 10b-5 in 1942, see SEC Securities Exchange Act Release No. 3230, the court in *Kardon* v. *National Gypsum Co.*, 69 F. Supp. 512, 514 (E.D. Pa. 1946), applied the principle that the violator of a provision is subject to suit by those especially protected by the provision, see *Texas & Pac. Ry.* v. *Rigsby*, 241 U.S. 33 (1916), and found an implied right to sue under Section 10(b) and Rule 10b-5. When this Court first considered the issue in *Superintendent of Insurance* v. *Bankers Life & Casualty Co.*, *supra*, the Court "explicitly acquiesced in the 25-year-old acceptance by the lower federal courts of a Rule 10b-5 cause of action" without specifically examining congressional intent on that issue. *Cannon* v. *University of Chicago*, 441 U.S. 677, 690-693 n.13 (1979). Congress has ratified the private Section 10(b) action, *Basic*, 485 U.S. at 231, and petitioners do not question the right of investors to sue under Section 10(b). Pet. Br. 16 n.7.

policy by implying a contribution remedy where the statute provides an express right to sue, but no right of contribution. *Northwest Airlines, Inc.* v. *Transport Workers Union*, 451 U.S. 77 (1981) (Equal Pay Act of 1963 and Title VII of the Civil Rights Act of 1964); *Texas Industries, Inc.* v. *Radcliff Materials, Inc.*, 451 U.S. 630 (1981) (Sherman and Clayton Acts). In each case, the Court concluded that, absent either a showing of congressional intent to create a contribution remedy, or a basis for exercising federal common law authority, the Court lacked power to recognize a right of contribution. *Northwest Airlines*, 451 U.S. at 91-99; *Texas Industries*, 451 U.S. at 638-647. In both cases, however, the Court reserved the quite different issue posed here—whether contribution should be implied, by borrowing that remedy from analogous provisions in the federal securities laws, for defendants sued under the implied Section 10(b) cause of action. *Northwest Airlines*, 451 U.S. at 91-92 n.24; *Texas Industries*, 451 U.S. at 640 n.11.

2. Petitioners and their amici contend that the issue in this case must be resolved under the analysis utilized in *Northwest Airlines* and *Texas Industries* and that the Court should conclude, as it did in those cases, that neither congressional intent nor federal common law justify recognition of an implied contribution right. Pet. Br. 9-11; NASCAT Br. 4-11. For several reasons, petitioners' contention is unsound.

a. The question whether the Court may imply a right of contribution under Section 10(b) raises distinct issues from the question whether the Court may add a contribution remedy to an express scheme of rights that conspicuously omits such a remedy. Although "federal courts, unlike their state counterparts, are courts of limited jurisdiction that have not been vested with open-ended lawmaking powers," *Northwest Airlines*, 451 U.S. at 95, this Court has not abstained from the task of construing and developing the existing implied rights of action under

the securities laws. Rather, the Court shaped those implied rights in order to harmonize them with the express congressional scheme and to promote their consistent and fair administration. That power to "round[] out" the substance of an existing implied right applies in this case. *Virginia Bankshares, Inc.* v. *Sandberg*, 111 S. Ct. 2749, 2764 (1991).

The Court's decision in *Blue Chip Stamps* v. *Manor Drug Stores*, *supra*, illustrates that point. In that case, the issue was whether nonpurchasers or nonsellers of securities had standing to sue under Rule 10b-5. 421 U.S. at 725. The text of the statute did not address that issue, but the Court acknowledged that "[w]e are dealing with a private cause of action which has been judicially found to exist, and which will have to be judicially delimited one way or another unless and until Congress addresses the question." *Id.* at 749. The Court resolved the issue by noting the trend in judicial decisions,[7] by comparing Section 10(b) to the structure of the express rights of action,[8] and by reviewing policy considerations.[9] *Id.* at 733-749.

More recently, the Court recognized its power to extend an implied right in order to maintain evenhanded administration of the securities laws. In *Virginia Bank-*

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[7] The Court observed that "virtually all of the lower federal courts facing the issue" had limited the plaintiff class to purchasers or sellers. 421 U.S. at 731. The Court gave weight to that "longstanding" view of the courts. *Id.* at 733.

[8] The Court noted that the express private rights to sue under Sections 11 and 12 of the Securities Act, 15 U.S.C. 77k, 77*l*, and Sections 9 and 18 of the Exchange Act, 15 U.S.C. 78i, 78r, are limited to purchasers or sellers of securities. "It would indeed be anomalous," the Court concluded, "to impute to Congress an intention to expand the plaintiff class for a judicially implied cause of action beyond the bounds it delineated for comparable express causes of action." 421 U.S. at 736.

[9] The Court concluded that those considerations favored limiting standing to purchasers or sellers of securities. 421 U.S. at 749.

shares, Inc. v. *Sandberg, supra*, the Court was asked to expand the implied private right to sue for proxy fraud under Section 14(a) of the Exchange Act, 15 U.S.C. 78n(a). See *J.I. Case Co.* v. *Borak*, 377 U.S. 426 (1964). The Court held that a claim to expand the *Borak* right is not necessarily foreclosed by "congressional silence" on the issue of private enforcement of Section 14(a). 111 S. Ct. at 2764. Citing *Blue Chip Stamps*, the Court stated that "where a legal structure of private statutory rights has developed without clear indications of congressional intent, the contours of that structure need not be frozen absolutely when the result would be demonstrably inequitable to a class of would-be plaintiffs with claims comparable to those previously recognized." 111 S. Ct. at 2764.[10]

In *Northwest Airlines* and *Texas Industries*, Congress had created the very causes of action at issue, and there was no justification for the courts to add to the scope of those rights absent a clear showing of specific congressional intent, or an independent source of common law power. As this Court recognized in *Blue Chip Stamps*, 421 U.S. at 749, however, the unique history of Section 10(b) requires a different analysis. The implied right under Section 10(b) was established before this Court made clear that the "most important inquiry" in the implication of a right is "whether Congress intended to create the private remedy." *Suter* v. *Artist M.*, 112 S. Ct. 1360, 1370 (1992); *Thompson* v. *Thompson*, 484 U.S. 174, 189-190 (1988) (Scalia, J., concurring); *Touche Ross & Co.* v. *Redington*, 442 U.S. 560, 575 (1979).

[10] Petitioners assert (Br. 18) that *Virginia Bankshares* held that "any attempt to extend [the] scope [of a previously recognized implied right] will be subjected to rigorous analysis under the correct standard," namely, an inquiry in congressional intent. The Court did not so hold, however; it stated that while "congressional silence * * * is * * * a serious obstacle to the expansion" of an implied right, it is not "a necessarily insurmountable barrier." *Virginia Bankshares*, 111 S. Ct. at 2764.

Having created the Section 10(b) cause of action, it would be anomalous to conclude that the courts have no power to develop it in conformity with the overall congressional scheme. It would be "demonstrably inequitable," *Virginia Bankshares*, 111 S. Ct. at 2764, to deny contribution to defendants in Section 10(b) actions in light of the congressional determination to permit defendants in express securities fraud actions to reduce their liability through contribution.

Petitioners contend (Br. 23) that while the courts must engage in some lawmaking when filling out the rights of plaintiffs under Section 10(b), the courts cannot create "a new cause of action" on behalf of Section 10(b) defendants. Defendants, as well as plaintiffs, however, are entitled to have Section 10(b) applied fairly to them.[11] Contribution claims under Section 10(b) arise only because the courts have determined that liability under the provision is joint and several, see *Globus* v. *Law Research Service, Inc.*, 442 F.2d 1346 (2d Cir.) (per curiam), cert. denied, 404 U.S. 941 (1971), and that rule is itself adopted from the express rights in the securities laws. See 15 U.S.C. 77k(f). It is not a large step to borrow the corresponding express rights of contribution.

Moreover, while contribution claims have been treated as a "right of action," *Texas Industries*, 451 U.S. at 639, the contribution remedy under Section 10(b) is not entirely distinct from the existing implied right, but is closely tied to it. The plaintiff in a contribution case will have been a defendant in the investor's original Section 10(b) suit, and the defendant in a contribution case will always be a person who either was sued, or could have been sued, in the original action. Contribu-

[11] To hold that, because Section 10(b) is an implied action, it cannot be developed in ways that promote fairness for both parties would be "highly unjust to those who must litigate past inventions." *Lampf*, 111 S. Ct. at 2783 (Scalia, J., concurring).

tion issues commonly arise as cross-claims in the original Section 10(b) action. In short, contribution is derivative of the original implied claim, serving to finish what the Section 10(b) litigation began. Courts are not powerless to complete the implied Section 10(b) action by apportioning liability among defendants—as the comparable express actions provide.

b. Although the text and history of Section 10(b) provide no guidance on the issue of contribution, that is not to say that there is no evidence of congressional intent. Congress consistently provided a right of contribution in the analogous express rights in the Exchange Act, and that legislative pattern should inform resolution of the parallel issue under Section 10(b). As this Court has recognized, evidence of intent from the "overall legislative scheme," *Texas Industries*, 451 U.S. at 639, and "statutory structure," *Northwest Airlines*, 451 U.S. at 94, is highly relevant in determining whether courts should recognize a contribution remedy.

In the implied-rights context, the need to consider statutory structure to discern legislative intent is particularly strong, for other sources will ordinarily provide no assistance. See *Franklin* v. *Gwinnett County Public Schools*, 112 S. Ct. 1028, 1035 (1992) ("Because the [Title IX] cause of action was inferred by the Court in *Cannon* [v. *University of Chicago*, 441 U.S. 677 (1979)], the usual recourse to statutory text and legislative history in the period prior to that decision necessarily will not enlighten our analysis."). For precisely that reason, the Court has in the past consulted the comparable express rights in delineating the boundaries of Section 10(b). *Lampf*, 111 S. Ct. at 2780 (statute of limitations); *Blue Chip Stamps*, 421 U.S. at 729 (standing); *Ernst & Ernst* v. *Hochfelder*, 425 U.S. at 206 (scienter requirement); *Bateman Eichler, Hill Richards, Inc.* v. *Berner*, 472 U.S. 299, 314 (1985) (*in pari delicto* defense).

If the courts were powerless to recognize contribution under Section 10(b), it would produce precisely the harm that this Court's modern implied-right-of-action jurisprudence seeks to prevent: encroachment on the legislative role through judicial policymaking. The Court has concluded that there is rarely justification to supplement express remedial schemes with judicially created rights, not only because of the potential for interfering with the legislative plan, but also because the creation of the right to sue involves policy choices that are better made by a legislature than a court. *Northwest Airlines*, 451 U.S. at 97; *Texas Industries*, 451 U.S. at 646-647; *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 444 U.S. 11, 19 (1979); *Massachusetts Mutual Life Ins. Co.* v. *Russell*, 473 U.S. 134, 147 (1985).

In this case, however, those values point in the opposite direction. The disallowance of contribution under Section 10(b) would place defendants sued under the implied right in a worse position than those sued under the express rights. Section 10(b) defendants would be denied the benefit of Congress' concern that comparably situated defendants under the securities laws not be saddled with disproportionate damages liability—not because Congress intended that result, but because their liability rests on a right of action the courts created. Modelling the right of contribution under Section 10(b) on the analogous express rights avoids that incongruous result.[12]

c. Finally, contribution under Section 10(b) has long been the status quo in the lower courts. Since a right of

[12] Contribution under the Exchange Act differs from the provision that a plaintiff may be required to post a bond to secure costs, which is found in some, but not all, of the express rights. Compare 15 U.S.C. 77*l*(2) and 78i(e) with 15 U.S.C. 78p and 78cc. Because there is no apparent rationale for including that provision in some (but not other) sections, courts have refused to import the bond requirement into Section 10(b) litigation. See *McClure* v. *Borne Chem. Co.*, 292 F.2d 824, 837 (3d Cir.), cert. denied, 368 U.S. 939 (1961).

contribution was first recognized in *deHaas* v. *Empire Petroleum Co.*, 286 F. Supp. 809, 815-816 (D. Colo. 1968), aff'd in part, vacated in part, on other grounds, 435 F.2d 1223 (10th Cir. 1970), contribution has been widely approved in Section 10(b) litigation.[13] The "long-standing acceptance" of contribution under Section 10(b) is entitled to weight in resolving this issue. *Blue Chip Stamps*, 421 U.S. at 733; see also *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Curran*, 456 U.S. 353 (1982).

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[13] The court in *deHaas* accepted Professor Loss's suggestion that "might not a court * * * permit contribution [under Section 10(b)] in view of the fact that contribution clauses are found in § 11 of the 1933 act and §§ 9(e) and 18 of the 1934 act * * *, the *specific* liability provisions which contemplate multiple defendants?" 3 L. Loss, *Securities Regulation* 1739-1740 n.178 (2d ed. 1961). Since then, four courts of appeals have allowed contribution. See *Smith* v. *Mulvaney*, 827 F.2d 558, 561 (9th Cir. 1987); *Huddleston* v. *Herman & MacLean*, 640 F.2d 534, 558 & n.44 (5th Cir. 1981), aff'd in part and rev'd in part on other grounds, 459 U.S. 375 (1983); *Heizer Corp.* v. *Ross*, 601 F.2d 330, 332 (7th Cir. 1979); *Globus, Inc.* v. *Law Research Service, Inc.*, 318 F. Supp. 955, 958 (S.D.N.Y. 1970), aff'd per curiam, 442 F.2d 1346 (2d Cir. 1971), cert. denied, 404 U.S. 941 (1971). Numerous district courts have followed the same approach. See, *e.g.*, *Baker* v. *BP America, Inc.*, 749 F. Supp. 840, 842-844 (N.D. Ohio 1990); *Marrero* v. *Abraham*, 473 F. Supp. 1271, 1277 (E.D. La. 1979); *McLean* v. *Alexander*, 449 F. Supp. 1251, 1266-1267 (D. Del. 1978), rev'd on other grounds, 599 F.2d 1190 (3d Cir. 1979); *Odette* v. *Shearson, Hammill & Co.*, 394 F. Supp. 946, 957-958 (S.D.N.Y. 1975); *Liggett & Myers, Inc.* v. *Bloomfield*, 380 F. Supp. 1044, 1046 (S.D.N.Y. 1974); *Alexander & Baldwin, Inc.* v. *Peat, Marwick, Mitchell & Co.*, 385 F. Supp. 230, 238 (S.D.N.Y. 1974); *Getter* v. *R.G. Dickinson & Co.*, 366 F. Supp. 559, 569 (S.D. Iowa 1973). Among the courts of appeals, the Eighth Circuit stands alone in rejecting contribution under Section 10(b). *Chutich* v. *Touche Ross & Co.*, 960 F.2d 721 (1992). That court, however, did not examine the structure of express rights or congressional intent; it simply rejected the argument that federal common law, as described in *Northwest Airlines* and *Texas Industries*, justifies implication of contribution rights. 960 F.2d at 723-724.

B. The Securities Exchange Act Manifests A Clear Congressional Intent To Permit Contribution

The remedial structure of the Exchange Act demonstrates that Congress favored contribution rights for violators held jointly and severally liable for damages from securities fraud. While the common law denied contribution to intentional tortfeasers, see *Merryweather* v. *Nixan*, 101 Eng. Rep. 1337 (K.B. 1799), the Exchange Act changed that rule under the express rights to which Section 10(b) is comparable. That scheme should be respected under Section 10(b) as well.

1. Congress enacted the Exchange Act in part to remedy perceived deficiencies in the common law. *Herman & MacLean* v. *Huddleston*, 459 U.S. at 389. The Act provides for comprehensive regulation of securities trading and establishes an ongoing reporting system for public companies. *E.g.*, 15 U.S.C. 78i, 78k, 78*l*, 78m. In addition, Congress provided express remedies for investors injured by manipulative practices or false or misleading reports. Section 9(e) creates a right of action in favor of investors affected by manipulation against any person who willfully participates in proscribed acts. 15 U.S.C. 78i(e). Section 18(a) creates a right of action in favor of investors affected by false or misleading statements, made in bad faith, in filings with the Commission. 15 U.S.C. 78r(a). With respect to each of those actions, Congress specifically provided contribution rights:

> Every person who becomes liable to make any payment under this [provision] may recover contribution as in cases of contract from any person who, if joined in the original suit, would have been liable to make the same payment.

15 U.S.C. 78i(e), 78r(b).[14]

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[14] Section 11(f) of the Securities Act of 1933, 15 U.S.C. 77k(f), also provides a right of contribution for violations of the prospectus provision of that Act "unless the person who has become liable was,

The Exchange Act's contribution language was modelled on the British Companies Act, which had altered the common law of torts by permitting all violators of its provisions to recover contribution "as in contract." See Douglas & Bates, *The Federal Securities Act of 1933*, 43 Yale L.J. 171, 178 & n.29 (1933), citing 19 & 20 Geo. V., ch. 23, § 37(g) (1929); see also *Gerson* v. *Simpson*, 89 L.T.R. 117 (A.D. 1903). The reference "as in contract" reflected the fact that, at common law, contribution was permitted among those jointly liable on a debt. 2 W. Jaeger *Williston on Contracts* § 345, at 762-765 (3d ed. 1959).

As this Court recently explained, the rights of action under Sections 9 and 18 are directly analogous to Section 10(b) cause of action. *Lampf*, 111 S. Ct. at 2781. Section 10(b) is a "catchall" provision designed to target manipulative or deceptive practices in connection with the purchase or sale of any security in violation of rules promulgated by the Commission. 15 U.S.C. 78j(b); see *Ernst & Ernst* v. *Hochfelder*, 425 U.S. at 203.

> Section 9 of the 1934 Act, 15 U.S.C. § 78i, pertaining to the willful manipulation of security prices and § 18, 15 U.S.C. § 78r, relating to misleading filings, target the precise dangers that are the focus of § 10(b). Each is an integral element of a complex web of regulations. Each was intended to facilitate a central goal: "to protect investors against manipulation of stock prices through regulation of transactions upon securities exchanges and in over-the-counter markets, and to impose regular reporting

and the other was not, guilty of fraudulent misrepresentation." That language indicates that Congress intended to permit contribution even for intentional violators of the Act against similarly situated defendants. The qualifying language found in Section 11(f) was not imported into the Exchange Act, because Sections 9 and 18 do not prohibit mere negligence. See *Ernst & Ernst* v. *Hochfelder*, 425 U.S. at 209 n.28.

> requirements on companies whose stock is listed on national securities exchanges."

Lampf, 111 S. Ct. at 2781, quoting *Ernst & Ernst*, 425 U.S. at 195. In *Lampf*, the Court relied on those similarities in holding that the statute of limitations provided in Sections 9 and 18 should govern private actions under Section 10(b). 111 S. Ct. at 2781. The reasoning in *Lampf* applies to contribution as well.[15]

In an important respect, the relatively short statutes of limitations provided in Sections 9 and 18 and the rights of contribution in those provisions serve similar purposes: both put boundaries on a defendant's exposure to liability under the rights of action that Congress created. The policy of concern for defendants' interests reflected in the securities laws, see Ruder, *Multiple Defendants in Securities Law Fraud Cases: Aiding and Abetting, Conspiracy, In Pari Delicto, Indemnification, and Contribution*, 120 U. Pa. L. Rev. 597, 646 (1972), is evident not only in the limitations and contribution provisions, but also in the restriction on recoveries under the Act to actual damages, 15 U.S.C. 78bb(a). That policy of concern for the interests of defendants has the same relevance to Section 10(b) litigation as it has to the express rights. Accordingly, as many courts have held, see note 13, *supra*, the express recognition of contribution claims under Sections 9 and 18 should also govern the implied right under Section 10(b).

2. Citing other securities rights of actions that do not explicitly authorize contribution, petitioners contend (Br. 24-28) that the federal securities laws as a whole do not

[15] Both Sections 9 and 18 provide limitations periods that require an investor to sue within one year of discovery but not more than three years from the violation. 15 U.S.C. 78i(e), 78r(a). In *Lampf*, the Court noted that the language of those provisions differs somewhat, and it selected the statute of limitations contained in Sections 9 to be used in Section 10(b) actions. *Lampf*, 111 S. Ct. at 2782 n.9. Here, the language of the contribution provisions in Sections 9 and 18 is substantively identical.

reveal a congressional intent to allow contribution under Section 10(b). Petitioners are mistaken.

Section 16(b) of the Exchange Act, 15 U.S.C. 78p(b), provides a right of action to a corporation or its shareholders to recover short-swing profits realized when a corporate insider trades in the company's stock. *Gollust* v. *Mendell*, 111 S. Ct. 2173, 2175-2176 (1991). It contemplates that ordinarily there will be a single defendant who will be liable for his own profits, and unlike Sections 9 and 18, it does not provide for joint and several liability. See *Blau* v. *Lamb*, 163 F. Supp. 528, 531 (S.D.N.Y. 1958) (Section 16(b) plaintiff must prove that each defendant realized profits). Contribution is, therefore, ordinarily irrelevant to Section 16(b) claims; the absence of a contribution right under that provision is therefore not surprising. Just as in *Lampf*, 111 S. Ct. at 2780 n.5, where the Court noted that Section 16(b) "differs in focus from § 10(b) and from the other express causes of action," here, the distinctive characteristics of the Section 16(b) disgorgement remedy explain the absence of contribution.[16]

Section 20(a), 15 U.S.C. 78t(a), expands the categories of persons who may be sued under other provisions. It imposes joint and several liability in certain circumstances on "every person who controls any person liable" under the Exchange Act "*with and to the same extent as such controlled person * * * is liable.*" 15 U.S.C. 78t(a) (emphasis added). That provision is not substantive; it merely incorporates the liability created in other sections

[16] Petitioners state (Br. 27) that under Section 20(a), 15 U.S.C. 78t(a), a control person of a Section 16(b) insider could be held jointly and severally liable for the insider's short-swing profits. While that is theoretically correct, it is of no significance here. The remote possibility that a control person might be held liable for disproportionate damages under Section 16(b) does not take away from the fact that the usual defendant under Section 16(b) would be required simply to disgorge *his* profits, and that fact explains the absence of contribution rights.

of the Securities Exchange Act. Accordingly, although Section 20(a) does not contain its own contribution provision, it incorporates contribution rights provided in the substantive rules. See *Laventhol, Krekstein, Horwath & Horwath* v. *Horwitch*, 637 F.2d 672, 675 (9th Cir. 1980) (holding that counterpart control-person provision of the Securities Act of 1933, 15 U.S.C. 77o, incorporates the contribution rights of the underlying substantive provision alleged to have been violated), cert. denied, 452 U.S. 963 (1981).[17]

Finally, the recently enacted Section 20A of the Exchange Act is not relevant here.[18] It permits certain investors to hold insider traders and their tippers jointly and severally liable for profits gained or loss avoided in the unlawful transaction. 15 U.S.C. 78t-1(a), (b)(1), (c). That provision is more like the disgorgement remedy in Section 16(b) than the damages remedies for fraud available under Sections 9, 18, and 10(b). It does not pose the same threat of disproportionate liability as do the damages remedies, as each defendant is essentially liable only for his own gain.[19] In *Lampf*, this Court noted

[17] A few district courts and one article have incorrectly suggested that Section 20(a) does not afford contribution rights. See, *e.g.*, *In re Olympia Brewing Co. Sec. Litigation*, 674 F. Supp. 597, 615 & n.18 (N.D. Ill. 1987); Loewenstein, *Implied Contribution Under the Federal Securities Laws: A Reassessment*, 1982 Duke L.J. 543, 551. That analysis, however, overlooks Section 20(a)'s language, which states that the controlling person's liability exists only "to the same extent as [the] controlled person."

[18] Section 20A, 15 U.S.C. 78t-1, was enacted as part of the Insider Trading and Securities Fraud Enforcement Act of 1988, Pub. L. No. 100-704, § 5, 102 Stat. 4680. The provision states that "[n]othing in this section shall be construed to limit * * * the availability of any cause of action implied from a provision of this chapter." 15 U.S.C. 78t-1(d).

[19] Liability under Section 20A is limited to the profits made or loss avoided through insider trading, see 15 U.S.C. 78t-1(b)(1). The tippee is liable because he directly profits; the tipper is liable

the special characteristics of Section 20A in rejecting it as a source for the statute of limitations governing Section 10(b) claims. 111 S. Ct. at 2781. The same conclusion applies in the contribution context.[20]

In sum, the Securities Exchange Act reflects a clear congressional purpose to allow persons who commit intentional securities frauds of the sort addressed in Section 10(b) to seek contribution from their fellow wrongdoers. This Court has cited the Exchange Act's express contribution provisions as evidence that "it is particularly important to permit litigation among guilty parties [that will serve] to expose their unlawful conduct and render them more easily subject to appropriate civil, administrative and criminal penalties." *Bateman Eichler*, 472 U.S. at 315-316 & n.28.[21] In view of the significance that

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because he benefits by giving the tippee that opportunity, see *Dirks* v. *SEC*, 463 U.S. 646, 664 (1983) ("The tip and trade resemble trading by the insider himself followed by a gift of the profits to the recipient."). Moreover, if the defendant has previously disgorged his illegal trading profits in a Commission action, that disgorgement offsets his liability in the private action, 15 U.S.C. 78t-1(b)(2), and he may have to pay nothing to the private plaintiff.

[20] Some courts have drawn additional support for contribution under Section 10(b) from the fact that the Securities Act of 1933 provides for contribution in actions based on a false or misleading prospectus, 15 U.S.C. 77k(f). Petitioners note (Br. 26) that the other 1933 Act rights do not expressly authorize contribution, but the inferences petitioners draw from that observation are incorrect. Section 15, 15 U.S.C. 77o, is a control person provision comparable to Section 20(a) of the Exchange Act, and, as discussed above, it incorporates the liability conditions, and contribution rights, of the substantive provision violated. *Laventhol*, 637 F.2d at 675. Section 12, 15 U.S.C. 77*l*, provides a rescission remedy against securities sellers, which was not the type of remedy under which contribution traditionally was either relevant or available. See Loewenstein, *supra*, 1982 Duke L.J. at 551, citing 3 L. Loss, *Securities Regulation* 1739 n.178 (2d ed. 1961).

[21] In *Bateman Eichler*, the Court held that the defense of *in pari delicto* is not available to a broker-dealer sued for fraud by a customer under Section 10(b). The Court noted that, as Congress had expressly allowed the broker to sue fellow manipulators for contribution under Section 9(e), 15 U.S.C. 78i(e), Congress would not have intended the customer's wrongdoing to bar his suit against the broker. 472 U.S. at 316 n.28.

[22] In this case, for example, the shareholder plaintiffs sued the defendants under both Section 10(b) and Section 11 of the Securities Act of 1933, 15 U.S.C. 77k. See note 1, *supra*. Respondents,

Congress attached to contribution rights when creating express Exchange Act liability, contribution should be recognized under Section 10(b).

C. Policy Considerations Support Recognition of Contribution

1. The issue of contribution raises complicated policy choices and entails the balancing of competing values. Without the benefit of congressional guidance, this Court has declined to strike that balance on its own in interpreting the scope of express rights in federal statutory schemes. *Texas Industries*, 451 U.S. at 646-647; *Northwest Airlines*, 451 U.S. at 98. Here, however, Congress itself has balanced the competing policies raised by federal securities litigation seeking damages for fraud, and it determined to change the common law and allow contribution. Mirroring that statutory balance in litigation under Section 10(b) does not launch the federal courts into policymaking; it respects the express legislative scheme.

For the same reason, recognizing contribution under Section 10(b) does not inject a foreign element into securities litigation. With or without Section 10(b), contribution is, by congressional choice, an integral part of the federal securities laws. Where, as here, the plaintiff sues not only under Section 10(b) but also under the express securities rights that carry a contribution remedy, the courts and parties must take contribution into account.[22] See *Herman & MacLean* v. *Huddleston*, 459

U.S. at 387 (rights under Section 10(b) are cumulative of express Securities Act remedies). Petitioners and amicus NASCAT challenge the wisdom of allowing contribution, Pet. Br. 37-41; NASCAT Br. 15-29, but this Court need not enter into that debate. The 73d Congress, which was "best able to evaluate these policy considerations," *Northwest Airlines*, 451 U.S. at 98 n.41, has already indicated, in the text of Sections 9 and 18, how it wanted those issues resolved.

2. To the extent that the Court weighs policy considerations, cf. *Blue Chip Stamps*, 421 U.S. at 736, those considerations support contribution rights under Section 10(b). Contribution promotes the fair administration of the securities laws; it does not detract from the deterrent effect of Section 10(b); and it does not unduly hinder settlements or render Section 10(b) actions unmanageable.

a. The essential premise of contribution is that a "more equal distribution of justice" results when one wrongdoer is not "force[d] * * * to bear the entire loss, though the other may have been equally or more to blame." *Cooper Stevedoring Co.* v. *Fritz Kopke, Inc.*, 417 U.S. 106, 111 (1974). That concern for fairness applies with the same force to Section 10(b). Plaintiffs may elect to limit the wrongdoers sued, or may simply choose to execute a judgment against one of several defendants. Contribution tempers the possible arbitrariness that results from those actions. See *Heizer Corp.* v. *Ross*, 601 F.2d 330, 333 (7th Cir. 1979); Adamski, *Contribution and Settlement in Multiparty Actions Under Rule 10b-5*, 66 Iowa L. Rev. 533, 541-542 (1981).

The potential for unfairness is particularly acute under Section 10(b), because liability extends to primary as well as secondary violators acting in a variety of

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in turn, sought contribution from the accountant petitioners under Section 10(b) as well as the express contribution right in Section 11(f), 15 U.S.C. 77k(f). See note 3, *supra*.

different capacities. In multiple-defendant cases, participation and degrees of wrongdoing can vary widely. Ruder, *supra*, 120 U. Pa. L. Rev. at 599-600. The policy of the securities laws is to tailor the magnitude of liability to the level of fault. See, *e.g.*, 15 U.S.C. 78t(a) (specifying requirements for controlling-person liability); *Bateman Eichler*, *supra* (defining limits of *in pari delicto* defense); *Pinter* v. *Dahl*, 486 U.S. 622, 632-641 (1988) (same). Contribution accords with that policy.

b. Although deterrence is an important consideration under Section 10(b), in the 24 years since courts first recognized a right to contribution under that provision, see note 13, *supra*, the Commission has not found that the remedy has reduced the deterrent effect of the law. Nor has anyone suggested that the deterrent effect of the federal securities laws has been diluted by the express contribution provisions of the Securities Act and the Exchange Act. Whatever may be true under other laws, it does not appear that deterrence is undermined by allowing contribution under Section 10(b).

An economic analysis undertaken to determine the effects of allowing contribution among antitrust violators concluded that a no-contribution rule and a contribution rule yield the same deterrent effect. See Easterbrook, Landes & Posner, *Contribution Among Antitrust Defendants: A Legal and Economic Analysis*, 23 J. Law & Econ. 331, 349 (1980). The authors of the study suggest that if a violator is "risk averse," that is, if he would prefer a greater chance of a small loss to a smaller chance of a greater loss, a no-contribution rule would be a greater deterrent. *Id.* at 351. As this Court has noted, however, economists disagree on whether business decisionmakers are risk averse. *Texas Industries*, 451 U.S. at 636 n.8. It is quite possible that someone who is willing to violate the securities laws, and risk criminal liability

as well as large civil penalties, may be less risk averse than the average citizen.[23]

c. Finally, the concerns raised by petitioners and NASCAT that contribution will discourage settlement or complicate litigation do not justify depriving defendants of an equitable allocation of liability. Pet. Br. 38-40; NASCAT Amicus Br. 18-24.

The impact of contribution on settlements is difficult to determine. On the one hand, contribution can facilitate settlement by offering defendants the inducement of sharing their liability with other wrongdoers who were not sued in the original action. On the other hand, "a right to contribution may have a serious [adverse] impact on the incentive of defendants to settle," *Texas Industries*, 451 U.S. at 637, if the settling defendant is not protected from subsequent contribution claims. Moreover, the uncertainty occasioned by the effect of settlement under some contribution rules can inhibit plaintiffs from settling.[24]

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[23] The compatibility of contribution with Section 10(b) does not suggest that indemnification is consistent with the securities laws. Indemnification allows a violator to shift his entire responsibility for securities violations to someone else, thus significantly weakening the deterrent effect of the securities laws. There is no express authorization of indemnity in the federal securities laws, and the courts have correctly refused to imply a right to indemnification. See, *e.g.*, *King* v. *Gibbs*, 876 F.2d 1275, 1279-1283 (7th Cir. 1989); *Baker, Watts & Co.* v. *Miles & Stockbridge*, 876 F.2d 1101 (4th Cir. 1989) (en banc) (construing 15 U.S.C. 77*l*(2)); *Heizer*, 601 F.2d at 334.

[24] The principal competing rules are represented by the Ninth Circuit's decision in *Franklin* v. *Kaypro Corp.*, 884 F.2d 1222 (1989), cert. denied, 111 S.Ct. 232 (1990), and the Second Circuit's decisions in *Singer* v. *Olympia Brewing Co.*, 878 F.2d 596 (1989), cert. denied, 493 U.S. 1024 (1990), and *In re Masters, Mates & Pilots Pension Plan*, 957 F.2d 1020, 1029-1032 (1992) (ERISA contribution). In the Ninth Circuit, a Court may issue a "contribution bar" (protecting a defendant who has settled a multiparty action against contribution claims by nonsettling defendants), subject to

The manner in which contribution rights are defined raises complex issues, see NASCAT Amicus Br. 18-19, but there is no reason to believe that the courts cannot fashion fair and workable standards that would adequately protect both plaintiffs and defendants. Indeed, the courts of appeals must in any event develop such rules to implement the express contribution rights in the securities laws. See *Franklin* v. *Kaypro Corp.*, 884 F.2d 1222 (9th Cir. 1989) (involving contribution under Section 10(b) of the Exchange Act and Section 11 of the Securities Act of 1933), cert. denied, 111 S.Ct. 232 (1990). The contribution rules developed under the express rights should also apply to Section 10(b).

Nor does contribution under Section 10(b) add an unmanageable new dimension to securities litigation. Contribution, of course, will remain available under the express remedies in 15 U.S.C. 77k, 78i(e), and 78r(b). Although contribution actions can multiply or protract Section 10(b) proceedings, the universe of potential contribution plaintiffs is limited to those who are already defendants and who can credibly claim to have paid more than their proportionate share of the original plaintiff's damages. The universe of potential defendants is limited to those who could have been sued in the original action. There are numerous procedural tools available for dealing with cross-claims and third-party practice under the Federal Rules of Civil Procedure, and courts have a body of experience in managing complex litigation. Concerns

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the jury's allocation of fault between the settling and nonsettling defendants at the nonsettling defendants' trial. The nonsettling defendants then are liable only for their proportionate share of the plaintiff's total damages determined at trial. In the Second Circuit, the trial judge must conduct a hearing at the time of the settlement to determine whether the settlement is fair to the nonsettling defendants. If the settlement is approved, the settlement amount is offset against the plaintiff's recovery at trial against the nonsettling defendants. We take no position on what approach should be followed, and the Court need not address that issue in this case.

that those tools are inadequate in the area of securities law should not be permitted to override the fairness concerns served by contribution. Accordingly, the Exchange Act's rule allowing contribution for securities fraud defendants should be applied to Section 10(b).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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DECEMBER 1992

* The Solicitor General is disqualified in this case.

APPENDIX

Section 11(f) of the Securities Act of 1933, 15 U.S.C. 77k(f), provides:

> All or any one or more of the persons specified in subsection (a) of this section shall be jointly and severally liable, and every person who becomes liable to make any payment under this section may recover contribution as in cases of contract from any person who, if sued separately, would have been liable to make the same payment, unless the person who has become liable was, and the other was not, guilty of fraudulent misrepresentation.

Section 9(e) of the Securities Exchange Act of 1934, 15 U.S.C. 78i(e), provides in pertinent part:

> Any person who willfully participates in any act or transaction in violation of subsection (a), (b), or (c) of this section, shall be liable to any person who shall purchase or sell any security at a price which was affected by such act or transaction[.] * * *
>
> Every person who becomes liable to make any payment under this subsection may recover contribution as in cases of contract from any person who, if joined in the original suit, would have been liable to make the same payment.

Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. 78j(b), provides:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange—
>
> * * * * *
>
> (b) To use or employ, in connection with the purchase or sale of any security registered on a

national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

Section 18 of the Securities Exchange Act of 1934, 15 U.S.C. 78r, provides in pertinent part:

(a) Any person who shall make or cause to be made any statement in any application, report, or document filed [with the Commission] * * * which statement was at the time and in the light of the circumstances under which it was made false or misleading with respect to any material fact, shall be liable to any person (not knowing that such statement was false or misleading) who, in reliance upon such statement, shall have purchased or sold a security at a price which was affected by such statement, for damages caused by such reliance, unless the person sued shall prove that he acted in good faith and had no knowledge that such statement was false or misleading. * * *

(b) Every person who becomes liable to make payment under this section may recover contribution as in cases of contract from any person who, if joined in the original suit, would have been liable to make the same payment.

Rule 10b-5, 17 C.F.R. 240.10b-5, provides:

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange,

(1) to employ any device, scheme, or artifice to defraud,

(2) to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(3) to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person.

in connection with the purchase or sale of any security.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1992 542479 60118